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in the Supreme Court of the United States

OCTOBER TERM 1992

THOMAS SKUBAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BENEDICT P. KUEHNE
Counsel of Record
JON A. SALE
SONNETT SALE & KUEHNE
One Biscayne Tower, #2600
Two South Biscayne Blvd.
Miami, Florida 33131-1802
Telephone: 305/358-2000
Counsel for Petitioner

QUESTIONS PRESENTED

I.

WHEN RESPONDING TO A JURY REQUEST FOR FURTHER INSTRUCTIONS IN A SAVINGS AND LOAN PROSECUTION, DOES A DISTRICT JUDGE'S CONSTRUCTIVE AMENDMENT OF AN INDICTMENT WHICH ALTERS THE ESSENTIAL ELEMENTS OF THE OFFENSE OF MISAPPLICATION OF FUNDS, WHICH BROADENS THE SCOPE OF THE INDICTMENT, WHICH LESSENS THE PROSECUTION'S BURDEN OF PROOF BY ALLOWING CONVICTION ON A DISJUNCTIVE THEORY, AND WHICH FAILS TO DEFINE THE CRITICAL ELEMENT OF INJURY TO THE INSTITUTION, VIOLATE CONSTITUTIONAL PROTECTIONS?

II.

CAN THE BUSINESS RECORD EXCEPTION TO THE HEARSAY RULE, FEDERAL RULE OF EVIDENCE 803(6), BE EXTENDED TO ENCOMPASS ATTORNEY MEMORANDA PREPARED IN AN EFFORT TO PROMOTE PERSONAL PROTECTION AGAINST BEING ACCUSED OF INVOLVEMENT IN THE UNDERLYING CONDUCT?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Thomas Skubal, the codefendant, Robert C. Jacoby, and the respondent, United States of America.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Thomas Skubal, requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in *United States v. Jacoby*, 955 F.2d 1527 (11th Cir. 1992), rehearing denied May 27, 1992. *United States v. Jacoby*, 964 F.2d 1148 (11th Cir. 1992).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *United States v. Jacoby*, 955 F.2d 1527 (11th Cir. 1992).

JURISDICTION

On March 25, 1992, the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the district court. A petition for rehearing was filed, and was denied on May 27, 1992. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 13. *Carroll v. United States*, 354 U.S. 394 (1967).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides the following:

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. The Case.

This case involves critical issues arising out of the continuing saga of the savings and loan debacle, the financial collapse of a once-thriving institution known as Sunrise Savings & Loan Association ("Sunrise Savings"). This Florida financial institution experienced rapid growth during the 1980's, primarily as a result of its involvement in lending funds to commercial developers who were fueling the South Florida boom years. In 1987, a grand jury indicted three Sunrise officers and its two principal borrowers, William Frederick and Thomas Moye. Thomas Skubal was one of the indicted officers, and one of only two who proceeded to trial.[1] Thomas Skubal was a mid-level member of the Sunrise management team and was a vice president of Sunrise Mortgage Corp. Robert Jacoby was the president of Sunrise and chairman of the board.

The indictment alleged that from January 1983 to July 1985, the defendants engaged in a series of transactions which were calculated to conceal the deteriorating financial

[1] The third indicted officer, William Frame, the president of Sunrise Mortgage Corp., suffered a heart attack during trial. His case was severed and he is scheduled for trial in 1993.

condition of William Frederick and Thomas Moye from Sunrise's board of directors, from federal and state banking regulators, and from the public.[2] The indictment alleged 28 counts of conspiracy, misapplication of bank funds, and the making of false statements in documents and reports. Skubal was charged in only 15 counts, and was convicted on 5 counts, including conspiracy and four counts of misapplication. Jacoby was convicted on 15 counts.

During jury deliberations, the jury asked the court to clarify the difference between the indictment and the written jury instructions regarding the essential elements of misapplication. The trial court departed from the original oral instructions and from the indictment by telling the jury that misapplication requires proof of an intent to injure *or* defraud. The indictment alleged that the defendants acted with an intent to injure *and* defraud.

Skubal received a sentence of imprisonment for three years, followed by a 4-year term of probation. He is incarcerated. This court affirmed all convictions in *United States v. Jacoby*, 955 F.2d 1527 (11th Cir. 1992).

B. The Facts.

1. Background.

Sunrise opened for business in May 1980 as a chartered Florida financial institution insured by the Federal Savings & Loan Insurance Corp. ("FSLIC"). Sunrise was organized through the efforts of the Philadelphia law firm of Blank, Rome, Comisky & McCauley ("Blank Rome"). Skubal began his employment with Sunrise in November 1983 as an Assistant Vice President, having technical "back office"

[2] Frederick and Moye pled guilty prior to trial pursuant to plea bargains. They have not been sentenced.

responsibilities for loan review and construction disbursements.

Frederick and Moye, successful commercial real estate developers and partners in a shopping center development company, developed a strong banking relationship with Sunrise, and eventually became the largest borrowers. At one point, Frederick and Moye had outstanding construction loans of $160 million.

Sunrise and its borrowers were not immune to the real estate slowdown of the mid-1980's. Sunrise entered into a supervisory agreement with the Federal Home Loan Bank Board in 1984, which provided that any loans exceeding $500,000 must be approved by the Sunrise Board. FSLIC limited the loans to any one borrower to $50 million. Sunrise, on the basis of legal advice, treated Frederick and Moye as separate entities, thus avoiding the limitations imposed by the loan to one borrower rule. Sunrise was declared insolvent in 1985.

2. Misapplication Of Construction Funds.

In April 1984, Frederick and Moye purchased a 26-carat diamond ring and other jewelry for $1.8 million, using an insufficient funds check drawn on a Sunrise account. Frederick then met with Sunrise officers to find a way to pay for the purchases. Sunrise authorized the disbursement of funds from two construction accounts to cover the purchase of the diamond, based on the commissions and fees due Frederick and Moye. Skubal signed but did not authorize the issuance of two construction draw requests. Skubal was not a decision-maker in this diamond transaction and was acquitted of the charge arising from this arrangement.

3. Concealment Of Overdrafts.

In late 1983, a Sunrise branch manager discovered that Frederick's personal account was overdrawn by $100,000. The manager spoke to the Sunrise office about the overdrafts, and was informed that the corporate office "would take care of it." The corporate office then monitored the account, and the manager received instructions regarding that account from the corporate office, including Skubal. Overdrafts could be approved by a branch manager or a vice president. At Sunrise, overdrafts for good customers were routinely approved by management. Frederick's overdrafts were directed to either Skubal or Frame for approval, although there was no evidence that Skubal approved any particular overdraft and the trial testimony was that the Frederick overdrafts were taken to Frame.

By June 1984, the Frederick and Moye financial condition worsened and overdrafts increased. They were unable to make interest payments on their loans, resulting in Frame demanding that Frederick bring in checks to cover the interest. Frederick complied by bringing in worthless personal checks; Frame and Jacoby then directed a Sunrise manager to post the checks. This process resulted in the loans being listed as current. Consequently, the Sunrise delinquency reports prepared for the board did not show the delinquent loans.

4. Loan Manipulations To Remove Overdrafts From The Sunrise Books.

By the summer of 1984, Sunrise auditors discovered more than $4 million in overdrafts on the Frederick and Moye accounts. These overdrafts needed to be remedied by August 31, 1984, so Sunrise could receive a favorable rating in its annual report. A meeting was held to determine how

this problem could be resolved. The meeting was attended by Jacoby, Frame, Frederick, executive vice president Joseph Taber, and Ronald Berkovitz. The trial evidence was in conflict regarding Skubal's attendance. Prosecution witness Berkovitz testified that Skubal was not present at the meeting. Government witness Taber testified that Skubal was present briefly at an earlier meeting, but that Skubal was not present when the group discussed the overdraft problem. Frederick, the beneficiary of the loans, testified that Skubal was not involved in these loans "whatsoever." Following this meeting, Sunrise arranged to loan $500,000 each to various individuals, who would use the money to purchase property from Frederick and Moye, with the loan proceeds being used to pay off the overdrafts.

The borrowers for these loan transactions were Charles Powell, Virginia Valosin, and Meryl Wood. The loans were intended to benefit Frederick. The Blank Rome law firm prepared the loan documents. Skubal signed commitment letters for these loans, under the direction of executive vice president Taber. Taber was the loan originator and approved the loans for Sunrise. Skubal's execution of the "boiler plate" commitment letters was a ministerial task.

On August 30, 1984, Powell signed the loan documents for three $500,000 loans. Skubal was not present at the loan closings. On the same day, Frederick informed his cousin and employee, Virginia Valosin, that she was needed to sign loan documents the next day. Acting under these instructions, Valosin signed paperwork for a $500,000 loan, for which she received no proceeds. Meryl Wood signed the paperwork at the Blank Rome office on August 30, 1984. He obtained a $305,000 loan from Sunrise, although he never received any proceeds.

5. **Seawalk Purchase.**

Even though the August 30 loans removed the overdrafts from the books, Frederick still had considerable financial problems. Another solution was for Sunrise to purchase properties from Frederick at inflated prices, enabling the excess funds to be used to pay down the loans. One of these transactions was the Seawalk property, which was purchased by Sunrise from Frederick for $13.5 million, even though the loan payoff was $10 million. This transaction was approved by the Sunrise Board on the basis of a questionable appraisal. Skubal was not involved in this transaction.

REASONS FOR GRANTING THE WRIT

I.

A DISTRICT JUDGE HAS NO AUTHORITY TO CONSTRUCTIVELY AMEND A GRAND JURY INDICTMENT BY REINSTRUCTING THE JURY IN A MANNER WHICH ALTERS THE ESSENTIAL ELEMENTS OF THE OFFENSE OF MISAPPLICATION OF BANK FUNDS, WHICH BROADENS THE SCOPE OF THE INDICTMENT, WHICH LESSENS THE PROSECUTION'S BURDEN OF PROOF, AND WHICH FAILS TO DEFINE THE CRITICAL ELEMENT OF INJURY TO THE INSTITUTION.

With the continuing expansion of criminal prosecutions of savings and loan executives, courts are reviewing more cases in which business decisions are being challenged as criminal conspiracies. From the perspective of hindsight, a decision which ultimately brought negative financial consequences to a banking institution may well appear to be improper or questionable. Yet, at the time such decisions

were made, the executives and officers may have believed their actions were in the best interests of the depositors, the shareholders, and the institution itself. But, when financial institutions fail, many traditional business decisions become the subjects of law enforcement scrutiny. Such decisions may ultimately be viewed as principal reasons for the demise of the institution.

That is what happened to Sunrise Savings and the executives who went to trial. Their indictment alleged a garden variety selection of criminal misapplications, false statements, and conspiracy. Yet, the case was anything but routine. The defendants and the business practices of Sunrise Savings were alleged to have been responsible for the collapse of the once thriving institution. In the course of that trial, a number of events occurred which made it appear that bad business decisions could give rise to criminal liability, even in the absence of fraudulent intent. In this climate of public outrage at the savings and loan executives, courts must be ever vigilant to the difference between bad management and criminal liability. The courts in this case failed to acknowledge that distinction.

At the heart of this proceeding is an evaluation of a crucial jury instruction in a savings and loan prosecution, an instruction which essentially brands as criminal mere mistakes or business judgments made during the operation of a financial institution. The defendants in this case had been charged with a violation of 18 U.S.C. §657, by acting "with intent to injure **and** defraud Sunrise . . ." That grand jury charge was critical to the origination of the case, because the defendants were not accused of merely making bad business decisions, but of acting to defraud **and** do injury to Sunrise.

The defendants, particularly Skubal, utilized this specification of the charge as the central theme of the

defense: that any actions taken at Sunrise were done in good faith with the best interests of Sunrise in mind. The defendants may have committed lapses in judgment and may have made mistakes, but they were always looking out for the future of the institution. Much of the evidence presented at the trial supported this defense theme.

The trial court, when initially instructing the jury, followed the precise language of the indictment by informing the jury that the defendants must have acted with "intent to injure *and* defraud" Sunrise. The oral instructions differed from the written jury charge (which used the phrase "injure *or* defraud"), and the jury requested a clarification. The trial court, disregarding the oral instructions and the indictment, told the jury that the operative intent element could be proved in the disjunctive, so that the defendants were culpable if they acted with the "intent to injure *or* defraud."

The Eleventh Circuit approved that instruction, even though it was inconsistent with the grand jury's indictment and simplified the prosecution's burden of proof. The precedential impact of this decision is enormous, since it effectively allows bank executives to be convicted of criminal activity even if they act in good faith without any intent to defraud their respective institutions. If the only mens rea is that of an intent to injure, then virtually every officer of a failed institution is at risk, because a lending decision on any controversial or marginal loan may well injury a bank in the event that the project is unsuccessful. This court must correct this judicial mistake and restore the law to its rightful position, thereby giving notice to the financial industry that executives need not fear criminal consequences by doing their able best in managing financial institutions.

By charging that the defendants acted to "injure and defraud" Sunrise, the grand jury chose its words carefully.

The indictment was consistent with the statutory crime of misapplication, which is defined at 18 U.S.C. §657:

> **Lending, credit and insurance institutions.** Whoever, being an officer, agent or employee or connected in any capacity with . . . any . . . savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation . . . embezzles, abstracts, purloins, or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution . . . shall be fined not more than $1,000 or imprisoned not more than years or both . . .

Under the circumstances of this case, the disjunctive elements were unquestionably correct. The appellate court's contrary conclusion is inconsistent with precedent.

In the case of *United States v. Christo*, 614 F.2d 486 (5th Cir. 1980), the defendant was charged with misapplication of bank funds under 18 U.S.C. §656, in an indictment alleging that he "with intent to injure *and* defraud . . . did willfully and knowingly misapply. . ." *Id.* at 490 n.5 (emphasis added). On the basis of that conjunctive indictment, the district court instructed the jury:

> Under §656, as applicable here, the indictment must allege and the government must prove beyond all reasonable doubt that (1) the accused was an executive officer of a bank, (2) that the bank was connected in some capacity with the Federal Reserve System, (3) that the accused willfully misapplied the funds of that bank, and (4) *that the accused acted with intent to injure and defraud that bank.*

Christo is identical to this case,[3] involving a misapplication indictment charged in the conjunctive, and a jury instruction which should have been stated in the conjunctive. *See generally United States v. Riley*, 550 F.2d 233 (5th Cir. 1977) (intent to injure and defraud). The jury instruction should, as a constitutional mandate, be consistent with the grand jury indictment. The alteration or broadening of an indictment by court action is constitutional error. *See Branzburg v. Hayes*, 408 U.S. 665 (1972); *Stirone v. United States*, 361 U.S. 212, 215-217 (1960). The expansion of an indictment through jury instructions is "reversible error if it is possible that the defendant was tried for a crime other than that alleged in the indictment." *United States v. Ylda*, 653 F.2d 912, 914 (5th Cir. 1981). *See United States v. Figueroa*, 666 F.2d 1375 (11th Cir. 1982).

This Court recently had an opportunity to address the issue of due process concerns in the face of a general verdict of guilty to a multi-object conspiracy. In *Griffin v. United States*, ____ U.S. ____, 112 S.Ct. 466 (1991), the Court held that due process concerns are not violated by a general verdict in a multi-object conspiracy, provided that the evidence is adequate to satisfy one of the objects. In reaching this conclusion, the court recognized that implicit in the acceptance of a general verdict is the requirement that a jury be "properly instructed as to the law. . ." *Id.* at 474. That underlying principle is absent here, where the jury received inconsistent instructions and was led to believe that it could convict the defendants of a crime not charged by the grand jury's indictment.

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[3] The appellate court's reliance on *United States v. Payne*, 750 F.2d 844, 855 (11th Cir. 1985), is not controlling, because the portion of *Payne* which discussed the elements of the misapplication statute is mere dicta and did not involve an issue contested on appeal. Dicta is "inherently unreliable" as a source of precedent. *United States v. Teague*, 953 F.2d 1525 (11th Cir.) (on rehearing) (Edmondson, concurring), *cert. denied*, ____ U.S. ____, 113 S.Ct. 127 (1992).

In *United States v. Trice*, 823 F.2d 80 (5th Cir. 1987), the appellate court reversed convictions for making false statements to a financial institution because the court's instruction improperly expanded the charges. In that case, the defendant was charged with knowingly submitting false invoices for the purpose of influencing the bank upon "advance of loan proceeds. . ." Instead of limiting the instruction to the charge contained in the indictment, the court utilized the broader language found in the statute, which permitted the jury to convict the defendant for making a false statement with the intent to influence "any change or extension" of a loan, thus expanding the scope of the indictment. Since the expanded instruction allowed the jury to convict on evidence showing influence on a loan extension, even if there was no influence on a loan advance, the instruction differed from the charge returned by the grand jury. The resulting convictions, according to the court, could have been based on the broader language of the instruction, rather than on the indictment. The error was prejudicial in that case, since the evidence may not have supported the charge in the indictment.

Trice is analogous to this case, and is a persuasive indication that the troublesome decision in this case must be corrected. Here, the grand jury used restrictive and descriptive language in charging the misapplication crime.[4] The defendants prepared the defense based on the indictment. The jury reinstruction allowed the defendants to be convicted of something the grand jury did not accuse them of doing.

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[4] This is not a case in which the controlling statute utilizes disjunctive language which differs from the indictment. The charging statute in this case, 18 U.S.C. §657, does not define misapplication by referring to a defendant's intent. This is also not a case in which the statute describes several alternative means of committing the crime. *United States v. Burton*, 871 F.2d 1566 (11th Cir. 1989).

When the appellate court upheld the disjunctive instruction notwithstanding the indictment and the evidence, it concluded that the defendants had not properly objected to the jury instruction. That conclusion is wrong and should not stop the court from reviewing this important issue. The proper objections were made by the defense, because the very first time the court erroneously instructed the jury in the disjunctive was during the reinstruction. Counsel promptly and vigorously objected to any attempt to redefine the elements of the offense.[5]

The decision of the Eleventh Circuit is in direct and irreconcilable conflict on an important question of law. The use of the misapplication statute is increasing as more savings and loan prosecutions proceed past the investigation stage. If prosecutors, with the help of district judges, are able to broaden statutory application and disregard a grand jury's limiting language, individuals will have lost their constitutional protection "to be informed of the nature and cause of the accusation. . ." *United States v. Silverman*, 430 F.2d 106, 110 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971). Lessening the prosecution's burden of proof will not serve the cause of justice, because good faith business decisions and the absence of an intent to defraud should protect a banker from prosecution. The inevitable result of the Eleventh Circuit's decision, if allowed to stand, will be to make financial executives an endangered species. While corruption and wrongdoing must be policed, innocent and unintentional conduct should not be criminalized in the name of combatting a scandal at all costs.

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[5] Counsel also objected to the court's failure to define the essential element of "to injure," but the appellate court ignored this absence. The court's failure to define a term of art is a serious deficiency, particularly when the phrase "to defraud" received such a comprehensive definition. *See United States v. Angelos*, 763 F.2d 859, 861 (7th Cir. 1985) (court acknowledged difference between the terms "injure" and "defraud").

II.

THE BUSINESS RECORD EXCEPTION TO THE HEARSAY RULE DOES NOT ENCOMPASS ATTORNEY MEMORANDA PREPARED IN AN EFFORT TO PROMOTE PERSONAL PROTECTION AGAINST BEING ACCUSED OF INVOLVEMENT IN THE UNDERLYING CONDUCT.

The confrontation clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This protection has two principal components. First, because cross-examination is a vehicle to test the truth of a declarant's statements, the proponent of the declaration must either produce the person or demonstrate the unavailability of the declarant. *See Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). Second, if a declarant's unavailability is demonstrated, the confrontation clause nevertheless excludes hearsay unless it is "marked with such trustworthiness that there is no material departure from the reason of the general rule." *Ohio v. Roberts*, 448 U.S. at 65, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934).

To qualify for admission under the confrontation clause, a hearsay statement must be made under circumstances that provide sufficient indicia of reliability from which the jury can evaluate the truth. The trustworthiness indicia must be determined from the "totality of the circumstances." *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 3147 (1990). In determining whether the "sufficient indicia of reliability" requirement has been met, the Court in *Ohio v. Roberts* looked to whether the hearsay "falls within a firmly rooted hearsay exception," or whether it is supported by "a showing

of particularized guarantees of trustworthiness." 448 U.S. at 66.

The prosecution's proof in this case was strengthened by the admission of a memorandum prepared by Dana Scheer, an associate in the Blank Rome law firm. The memorandum pertained to the "sham loans" scheduled to close on August 30, 1984. In the memo, Scheer explained that he was instructed by Sunrise Savings President Jacoby to prepare closing documents even though the prerequisites to a closing had not been completed. As the trial judge remarked in ruling that the business records exception to the hearsay rule did not apply, such a cover yourself memorandum was not prepared in the usual course of business since it could only have been prepared in a "circumstance in which there was some unusual reason that would prompt Scheer" to write the memo (R.Supp. 9-1084-1086). Scheer, as we know, asserted the Fifth Amendment at trial, and offered no evidence of his purpose in writing the memorandum. The trial court concluded that while it did not satisfy the business records exception, the memorandum was otherwise admissible under the residual hearsay exception for declarants who are unavailable as witnesses. Fed.R.Evid. 804(b)(5).

The appellate court ruled that the business record exception applied, even though that was not the basis for admissibility in the trial court. In so doing, the Eleventh Circuit utilized such an expansive interpretation of the exception that would apply to virtually every document prepared by a lawyer, even when the circumstances of the preparation render the contents of the document questionable. Especially when the attorney-maker of a document is a suspect in criminal wrongdoing and has invoked the privilege against self-incrimination, the court's construction of the rule is constitutionally dangerous.

Rule 803(6), known as the business records exception to the hearsay rule, provides:

> The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

To be admissible under this exception, a document must be prepared in the normal course of business, must be made at or near the time of the events it records, and must be based on the personal knowledge of the maker or on the personal knowledge of another person who has a business duty to transmit the information. *Datamatic Services, Inc. v. United States*, 909 F.2d 1029 (7th Cir. 1990). But, where the source of the information included in the business record is an outsider, the business records exception does not apply unless the outsider's statement is otherwise admissible. *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260 (5th Cir. 1991). And, where the reliability or trustworthiness of the

underlying information or the making of the document are in doubt, admissibility is subject to the trial court's discretion. *United States v. Patterson*, 644 F.2d 890 (1st Cir. 1981).

While lawyers may routinely prepare documents and explanatory memoranda as a part of their professional activities, the mere preparation of a file memorandum does not make it a business record admissible under Rule 803(6). The test is whether an attorney memorandum was prepared in the regular course of business or whether it was prepared for some other purpose such as potential litigation. *See United States v. Baxter*, 492 F.2d 150, 165 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974).

This Court's decision in *Palmer v. Hoffman*, 318 U.S. 109, 115 (1943), recognized that in determining if documents are admissible because they were prepared in the "regular course of business," the court must look to "the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business." The issue in *Palmer v. Hoffman* concerned a railway engineer's statement to an accident investigator following a train accident. Although offered as a statement made in the regular course of business, the trial court declined to admit the document and the Supreme Court agreed. The Court noted that the business at issue was the railroad business, which routinely prepares and keeps records essential to its operations. While "[a]n accident report may affect that business in the sense that it affords information on which the management may act[, i]t is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls." *Id.* at 113.

The Court was quite specific in noting that the act of preparing reports or taking statements which preserve a version of an incident is *not* an aspect of the regular course of a business.

> But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made "in the regular course" of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was "regular" and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a "business" or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a "regular course" of a business

> but also to any "regular course" of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight not its admissibility. That provision comes into play only in case the other requirements of the Act are met.
>
> In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

Id. at 113-114 (citations omitted).

The Eleventh Circuit's application of the business record exception to an attorney's protective memorandum prepared as a result of an unusual event is inconsistent with *Palmer v. Hoffman* and the underlying rationale of the rule. The regular and ordinary business of a law firm for purposes of the business records exception does not extend to case specific memoranda recording one version of an event or transaction. Such memoranda are essentially designed to make a record in the event the transaction is questioned. That is essentially the equivalent of litigation-oriented records, which are not admissible because they lack inherent trustworthiness. *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1258-1259 (9th Cir. 1984); *Clark v. Los Angeles*, 650 F.2d 1033, 1037 (9th Cir. 1981), *cert. denied*, 456 U.S. 927, 102 S.Ct. 1974 (1982).

The Eleventh Circuit's decision is in irreconcilable conflict with court opinions construing the business records exception and with the underlying rationale of the rule. The internal memorandum was prepared as a one-sided protective version of a transaction, in order to provide a record in the event someone questioned the loan closings. The memorandum does not contain the same reliability of a traditional business record. Much of what lawyers do in the course of providing client representation may well be routine, but case related memoranda are not made with the same reliability that normally attends routine records kept in the course of a regularly conducted business activity. This is because "where the only function that the report serves is to assist in litigation or its preparation, many of the normal checks upon the accuracy of business records are not operative." *McCormick on Evidence* §308, at 877 n.26 (E. Cleary 3d ed. 1984).

Because the preparer of the memorandum in this case had a very substantial reason for attempting to shift the blame for the loans in question, and because the memorandum served merely to provide an explanation in the event that the loan transactions were questioned, it does not qualify as a business record. The Eleventh Circuit recognized that the memorandum was not ordinary or routine, when it stated that "[t]he evidence was that whenever Scheer believed it was necessary to explain something or make a record of an unusual circumstance, he prepared a memorandum to the file." *United States v. Jacoby*, 955 F.2d at 1357. The expansion of the business records exception to attorney memoranda is contrary to this Court's decision in *Palmer v. Hoffman* and is a threat to the principles protected by the confrontation clause of the Sixth Amendment. This Court must bring stability to the body of evidentiary jurisprudence by utilizing this case as the vehicle to curtail this unwarranted expansion of the hearsay rule.

CONCLUSION

The decision of the Eleventh Circuit in this case conflicts with prevailing precedent. The result reached by the appellate court threatens to undermine what has been settled precedent. This Court should grant a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

SONNETT SALE & KUEHNE
Counsel for Petitioner
One Biscayne Tower, #2600
Two South Biscayne Blvd.
Miami, Florida 33131-1802
Telephone: 305/358-2000

By: /s/ BENEDICT P. KUEHNE
BENEDICT P. KUEHNE
Counsel of Record
JON A. SALE

Appendix

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

Robert C. Jacoby and Thomas Skubal,

Defendants-Appellants.

No. 89-6210.
United States Court of Appeals,
Eleventh Circuit.
March 25, 1992.

Following jury trial before the United States District Court for the Southern District of Florida, No. 87-6034 Cr-WMH, Wm. M. Hoeveler, J., defendants were convicted of various financial crimes involving failed savings and loan. Defendants appealed. The Court of Appeals, Friedman, Senior Circuit Judge, sitting by designation, held that: (1) memorandum to file prepared by outside counsel to bank was admissible under business records exception to hearsay rule; (2) upholding admission of memorandum on ground other than that accepted by district court was appropriate; (3) witness' grand jury testimony was not admissible as substantive evidence as prior inconsistent statement where it gave more detail, but did not contradict, grand jury testimony which focused on slightly different point; (4) defendant opened door to cross-examination regarding damaging statements he made in business magazine; (5) refusal to sever cases against bank officials was not error; and (6) evidence was sufficient to sustain convictions.

Affirmed.

Appeals from the United States District Court for the Southern District of Florida.

Before COX, Circuit Judge, DYER and FRIEDMAN, Senior Circuit Judges.

FRIEDMAN, Senior Circuit Judge:

This criminal prosecution arose from the mid-eighties financial debacle of the Sunrise Savings and Loan Association (Sunrise) in South Florida. A jury convicted two former Sunrise officials of several financial crimes involving Sunrise. They challenge their convictions on various grounds: that evidence was improperly admitted and excluded, that prosecutorial misconduct denied them a fair trial, that one of the defendants improperly was denied a severance of his trial, that the evidence was insufficient to support the conviction of one defendant, and that the instructions on one of the crimes charged were erroneous. We reject all of these contentions, and affirm both convictions.

I

In 1987, a federal grand jury indicted three former Sunrise officers, including the appellants, and two of Sunrise's largest borrowers, William Frederick and Thomas Moye. (The third indicted officer, William Frame, suffered a heart attack during trial; his case was severed and will be retried.) Jacoby was Sunrise's president and chairman of its board of directors; Skubal was vice-president of Sunrise Mortgage Corporation, a wholly-owned subsidiary of Sunrise.

The indictment charged that from January 1983 to July 1985, Jacoby and Skubal engaged in a series of closely related acts calculated to conceal the dubious financial condition of Frederick and Moye from Sunrise's board of directors, from federal and state banking regulators, and from the public. The jury convicted Jacoby of one count of conspiring to misapply bank funds, in violation of 18 U.S.C. §657 (Supp. I 1989); seven counts of misapplying funds, in violation of that section; five counts of making false statements in documents relating to loan transactions, in violation of 18 U.S.C. §1014 (Supp. I 1989); and two counts

of making false entries in loan delinquency reports, in violation of 18 U.S.C. §1006 (Supp. I 1989). It convicted Skubal of one count of conspiring to misapply funds, in violation of 18 U.S.C. §657, and four substantive counts of misapplying funds under that section.

The district court sentenced Jacoby to five and a half years imprisonment and Skubal to three years imprisonment, followed by four years probation for each of them.

The evidence at trial implicated Jacoby and Skubal in an elaborate series of criminal transactions involving Sunrise management's efforts to conceal Frederick and Moye's true, and dire, financial condition, and its serious effect upon Sunrise. A summary of that evidence, viewed most favorably to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), follows.

A. *Background.* Sunrise commenced operations in 1980; the Federal Savings and Loan Insurance Corporation (FSLIC) insured its deposits. Jacoby was Sunrise's president from the beginning, and became chairman of its board of directors in 1983. Skubal joined Sunrise in November 1983, and became vice-president of Sunrise Mortgage Corporation shortly thereafter. In that position, Skubal was responsible for determining whether loans complied with federal regulations, and for construction disbursements.

Frederick and Moye were co-owners of Commercial Center Development Corporation, a real estate company involved in the development of strip shopping centers, and formed subsidiary "shell" corporations for planned centers. They entered into a banking relationship with Sunrise in 1982; by mid-1984 Sunrise had loaned Frederick, Moye, and their companies more than $150 million, and Sunrise was their exclusive lender.

The Boca Raton, Florida branch of the Philadelphia law firm of Blank, Rome, Comisky and McCauley (Blank,

Rome), was involved substantially in Sunrise's formation, organization and day-to-day operations until Sunrise was declared insolvent in 1985 and the government took it over.

Under FSLIC regulations, Sunrise's total loans to any one borrower could not exceed approximately $50 million at any given time. Sunrise circumvented these regulations by treating Frederick and Moye as separate entities, and by advancing loans to nominee third parties, including employees and relatives of Frederick and Moye, for the benefit of Frederick and Moye.

In early 1984, when interest reserves on millions of dollars in loans Sunrise made in 1982 and 1983 became depleted, representatives of the FSLIC and the Florida Comptroller's Office met with Sunrise's board of directors regarding problems with Sunrise's loan practices, including loans made to Frederick and Moye. At the meeting, the Sunrise board executed a supervisory agreement designed to assure Sunrise's adherence to prudent and safe banking practices in making loans. One provision of the agreement required that, as a prerequisite to approval, all future loans greater than $500,000 include specific supporting documentation demonstrating compliance with underwriting and credit requirements.

B. *Misapplication of Construction Funds.* In April 1984, Frederick and Moye purchased at a Christie's auction in New York City several expensive jewelry items, including a twenty-six carat diamond ring for $1,375,000. Moye paid for these items with a worthless personal check for approximately $1,829,000. Shortly thereafter, Frederick met with Sunrise officers in Jacoby's office to find a way to pay for the ring. Jacoby and Skubal agreed to consider whether construction funds could be disbursed to Frederick.

After the meeting, Frederick signed and Skubal approved two construction draw requests for $700,000 and $600,000, on two previously approved construction loans for

Frederick and Moye's shopping center projects. Neither of these loans authorized disbursement of funds to pay for a diamond. Frederick testified that Jacoby expressly approved the use of these construction funds to pay for Moye's ring to get them out of their "dilemma."

C. *Concealment of Overdrafts.* In late 1983, a Sunrise branch manager discovered that Frederick's personal account became overdrawn by $100,000 within a few days. When the manager spoke to Sunrise's corporate office about the overdraft, she was informed that headquarters "would take care of it." Following this incident, the branch manager received her instructions regarding Frederick's accounts from Sunrise's corporate office, primarily from Skubal. The daily overdraft reports she received no longer included Frederick's overdrafts, although all other account overdrafts were shown.

The bank's normal practice where accounts were substantially overdrawn for more than one week, was to close the account and turn it over to Sunrise's attorneys for collection.

By June 30, 1984, Frederick's personal checking account was overdrawn by $2,895,851.92. Frederick's and Moye's accounts, collectively, were overdrawn by $4,132,564. Throughout 1984, Skubal or Frame approved overdrafts on Frederick's accounts almost daily. During this period, Frederick and his companies gave Sunrise twenty-six worthless overdraft checks, totaling $923,980, for interest payments on Frederick's Sunrise loans, a practice designed to make the loans appear current and to remove them from Sunrise's monthly loan delinquency reports. The millions of dollars in overdrafts were the equivalent of unsecured loans from Sunrise to Frederick and Moye.

Neither Jacoby nor Skubal had authority to approve the overdrafts. Only Sunrise's board of directors could do so, and the board never was informed of the overdrafts. These

overdrafts were never reported to the state and federal regulators who reviewed Sunrise's operations.

By June 1984, the Frederick and Moye overdrafts, and the concealment of them from regulators and the Sunrise board, was so serious that Jacoby told Frederick that if Frederick did not find a way to cover the overdrafts, Jacoby "would probably lose his job." At the same time, Frederick's financial position worsened to the point that he was unable to make interest payments on approximately $150 million in Sunrise loans. In the Spring of 1984, Frame demanded that Frederick give Sunrise interest checks drawn on other banks for the interest payments, regardless of whether these checks were "good."

When Frederick brought in these worthless personal checks drawn on other banks, he met with Jacoby, Frame, and Special Loans Manager Lonnie Merrill. Frame, and then Jacoby, ordered Merrill to "post," or deposit, the checks. For several months thereafter, Frederick brought in worthless personal checks at the end of each month. Sunrise processed the checks at the end of each month, and its computer-generated loan delinquency reports therefore showed Frederick and Moye's loans as current.

Between May and July of 1984, Frederick brought Merrill and Frame more than $1.6 million in worthless checks, drawn mostly on out-of-state banks. These checks were posted as interest payments on Frederick and Moye's Sunrise loans. As a result, Merrill was able to prepare delinquency reports for Sunrise's board of directors in June, July, and August that omitted millions of dollars of Frederick and Moye's delinquent loans.

D. *Loan Manipulations to Remove Overdrafts from Sunrise's Books.* In late Summer 1984, Sunrise's auditors discovered the $4,132,564 in overdrafts on Frederick and Moye's personal accounts, and informed Jacoby that unless the overdrafts were satisfied by August 31, 1984, they would

be unable to give Sunrise an "unqualified" rating in its annual report.

Following the auditors' discovery of the overdrafts, a meeting was held among Jacoby, Skubal, Frame, Frederick, Sunrise's executive vice president Joseph Tabor, and Ronald Berkovitz, a representative of Alpha Capital Group. After rejecting Tabor's proposal to loan Frederick the funds to pay off the overdrafts, it was decided that Sunrise would make six or seven loans of $500,000 to various persons, which they would use to purchase property from Frederick and Moye, and Frederick and Moye would in turn use the funds to pay off the overdrafts.

The borrowers, Charles Powell, Virginia Valosin, and Meryl Wood, were selected randomly from persons those at the meeting knew. Frederick stated that he would pay the interest on the loans; Jacoby instructed Skubal and Tabor to "get it done." Skubal then assembled a set of loan documents, consisting of what appeared to be duly executed commitment letters, lines of credit approvals, promissory notes, mortgages, warranty deeds, and loans-to-one-borrower statements.

On August 30, 1984, Powell, of Alpha Capital, signed loan documents for three $500,000 loans in connection with his "purchase" of three properties in Maryland and Florida. Powell never submitted applications and financial statements for these loans, and he had never visited the three properties he was "buying" from Frederick.

On the same day, Frederick informed his cousin and employee, Valosin, that she might be "needed to sign some documents at Sunrise later on that day," and that unless she signed, "there would be foreclosures." Valosin then signed a commitment letter (executed earlier by Skubal and Tabor), a promissory note, a mortgage, and a loans-to-one-borrower statement granting her a $500,000 loan; her personal net worth at the time was "less than a thousand dollars."

Valosin never received any proceeds from this loan, and never was able to make the contractually required interest payments of more than $5,000 a month. She testified that she executed the loans-to-one-borrower statement "at the direction of someone else," that the representations in that document that she was not acting as a nominee were false, and that, contrary to the representations in the commitment letter prepared in her name, she had never given any financial information upon which that letter could have been based.

Wood was Frederick's yacht broker. On August 30, 1984, Frederick brought Wood to the Boca Raton office of Blank, Rome. Dana Scheer, a Blank, Rome attorney, asked Wood to sign a stack of documents and not read them. Wood signed the papers, which were documents for a loan of $305,000 from Sunrise. Wood did not understand why he was asked to sign the documents, and he did not understand that he supposedly was purchasing real estate. Even though he never gave a financial statement, the commitment letter he signed stated that such a statement had been prepared and approved.

Because of title defects regarding several of the properties involved in these transactions, such as unreleased first mortgages in favor of Sunrise and Frederick's execution of deeds even though he was not the owner of record, Valosin and Powell received worthless deeds.

This practice of loaning $500,000 or less to third parties who "bought" real estate from Frederick and Moye accomplished several purposes: (1) The loans were not "Frederick loans" even though he received the beneficial interest; (2) Sunrise's board of directors did not have to approve them; and (3) the loans avoided the underwriting documentation the supervisory agreement required. At closing, the funds to which Frederick would have otherwise been entitled from these real estate transfers were immediately transferred to Sunrise and deposited in

Frederick's checking accounts, thus removing Frederick's overdrafts by the close of business August 31, 1984.

E. *Sunrise's Seawalk Purchase.* The August 30 loans removed Frederick's overdrafts from Sunrise's books, but serious loan delinquency problems remained. In early Fall 1984, $70 to $80 million of Frederick's loans were seriously delinquent. To ameliorate Frederick's cash flow problems, Sunrise's management proposed that Sunrise purchase certain shopping centers that Frederick either had completed or were under contract. The board agreed and closing was set for late September.

One of the properties involved was 33 acres of undeveloped commercially zoned land in Hallandale Beach, Florida, referred to as "Seawalk." Sunrise had loaned Frederick and Moye the funds to acquire Seawalk in 1983.

Sunrise purchased Seawalk from Frederick for $13.5 million on September 28, 1984. The purchase price was calculated by adding three components: (1) the approximately $10 million required to pay off Frederick's original Seawalk loan; (2) $3 million necessary to make interest payments on Frederick's loans; and (3) $500,000 that Frederick demanded as part of the deal. Following the purchase, approximately $3 million of the purchase funds were paid to Sunrise to bring all of Frederick's accounts current.

After a special board meeting on October 3, 1984 at which the board ratified the Seawalk purchase, two sets of minutes of the meeting were prepared. An unsigned version stated: "The property has an appraised value of thirteen and a half million prepared by Benton and Associates." The version that Jacoby signed stated: "The property has an appraised value of $14,750,000 prepared by Pomeroy Appraisal Associates of Florida, Inc."

Sunrise management told Tabor, who supported this proposal, not to worry about the Seawalk purchase price

because Frederick had obtained a $14.75 million appraisal for the property and it would soon be purchased from Sunrise. Tabor testified that he had never seen an appraisal of the Seawalk property from Benton and Associates or from Pomeroy Appraisal Associates. On October 3, 1984, the only appraisal of the Seawalk property on file was for $10.182 million, which Failla Associates prepared in 1983 to support Frederick's original loan to purchase Seawalk.

It was only after Sunrise purchased Seawalk from Frederick that Sunrise's management asked Frederick for an appraisal of Seawalk. In mid-October, after the Seawalk closing, Frederick obtained the Pomeroy appraisal for $14.75 million, an appraisal shown at trial to have many deficiencies. Alvin Benton, of Benton and Associates, testified that, contrary to the unsigned minutes, he had not appraised Seawalk before Sunrise purchased it, and was not asked to appraise Seawalk until October 3, 1984, five days after the purchase. Seawalk was later appraised at $8.5 million, and sold to a third party for $8 million in 1988 by the Federal Asset Disposition Association.

Federal regulators questioned Jacoby in November 1984 about Sunrise's Seawalk purchase. Jacoby stated that he had the $14.75 million Pomeroy appraisal and "a feel" for the property, that Frederick and Moye received no cash from the deal, and that the proceeds were used only to repay Frederick's original loan and to make delinquent loans current.

II

Admission and Exclusion of Evidence

[1] A. *The Scheer Memorandum.* Jacoby's principle contention on appeal is that the district court committed reversible error when it received into evidence a memorandum to the file prepared by Blank, Rome attorney Dana Scheer, an associate in the Boca Raton office.

1. Scheer was deeply involved in Sunrise's day-to-day operations. The memorandum, dated August 29, 1984, which Scheer initialed, related to the "Frederick Work Out." It stated:

> I was requested by Rob Jacoby in a telephone conversation on this date (Rob Jacoby was in New York) to close each of these loans. Mr. Jacoby indicated that he had presented these loans before Executive Committee in evening session August 28, 1984, and had received their approval. Mr. Jacoby indicated that upon his return to Palm Beach he would immediately sign and forward a memo authorizing me to close these loans notwithstanding having no surveys, appraisals, title commitments, utility letters, permits, opinions of counsel, and notwithstanding the fact that by making several of these loans we might be violating doing business laws in the State of Maryland and placing mortgages on parcels which were not legally able to be subdivided in the event of foreclosure. Mr. Jacoby indicated that no Board approval would be necessary for any of these loans and that it was necessary to immediately close as soon as possible. A letter to file has been dictated by me and is in Mr. Jacoby's office awaiting his return.

The loans to which this memorandum referred were the seven loans of $500,000 or less to Powell, Valosin, and Wood for the purchase of real estate, closed on August 30, 1984 and designed to remove Frederick's overdrafts from Sunrise's books by August 31, 1984.

The memorandum was offered in conjunction with the testimony of Tabor, Valosin, Wood, Berkovitz, and Frederick to demonstrate that the August 30, 1984 loans were fixed at $500,000 or less to circumvent the Sunrise board and the underwriting and documentation requirements of the supervisory agreement, and that the

loans were closed at Jacoby's direction and with his awareness of the deficiencies in and problems with the loans.

The government contended that the memorandum was admissible under two exceptions to the hearsay rule: (1) the business records exception, Fed.R.Evid. 803(6); and (2) the residual hearsay exception for declarants who are unavailable as a witness, Fed.R.Evid. 804(b)(5). Because Scheer declined to testify on the basis of his fifth amendment privilege against self-incrimination, he was unavailable as a witness.

Jacoby opposed admission under either theory, contending that the document did not meet the requirements of the business records exception, and that it was inadmissible under the residual exception because it lacked adequate guarantees of trustworthiness and raised sixth amendment confrontation clause problems.

The district court questioned admissibility under the business records exception, because "it is not a routine type of thing." The court, although stating it was "not an easy question," admitted the memorandum under the residual exception of Rule 804(b)(5), finding that "it does have the necessary ingredients of authenticity and the words used, guarantees of trustworthiness, circumstantial guarantees of trustworthiness are sufficient to justify its admission" and "I do think it is relevant."

2. In admitting the memorandum, the district court did not hold it inadmissible under the business records exception. It merely questioned its admissibility under that exception, but did not decide the question because it admitted the memorandum under the residual exception of Rule 804(b)(5).

We conclude, however, that the memorandum was admissible under the business records exception (which, the government stated in its brief in this court, page 33, footnote

41, it continued to rely upon), and we therefore need not determine its admissibility under Rule 804(b)(5).

[2] Upholding the admission of the memorandum on a ground other than that of the district court is here appropriate. In *U.S. v. Williams*, 837 F.2d 1009 (11th Cir.), *cert. denied*, 488 U.S. 965, 109 S.Ct. 490, 102 L.Ed.2d 527 (1988), the trial court admitted hearsay evidence in a criminal case evidence under the business records exception. On appeal, the government conceded that the memoranda were not admissible under that exception, but argued that they were admissible as admissions of a party. Id. at 1012. This court held that the evidence was admissible as a party-admission, even though the government had not urged that theory in the district court, on the ground that the admission under either theory "served the same purpose," namely "to permit the introduction of evidence proving the truth of the matter asserted." Id. at 1013. *See also United States v. Rosenstein*, 474 F.2d 705, 710-11 (2d Cir.1973) (affirming admission of evidence improperly admitted at trial under business records exception where evidence properly admissible as party admission and admission under either theory served the same purpose).

In the present case, as in *Williams*, the admission of the evidence under the business records exception "served the same purpose" as its admission under Rule 804(b)(5). It was introduced to establish "the truth of the matter asserted," namely, that Jacoby had made to Scheer the statements the memorandum set forth. Indeed, the present case is even stronger for upholding the admission of the evidence on a different ground than was Williams. In Williams, the court of appeals upheld the admission on a ground the government had not provided in the district court. Here, on the other hand, we uphold the admission on the ground the government had asserted in the district court, but which the district court did not accept.

3. Federal Rule of Evidence 803(6) provides:

> The following [is] not excluded by the hearsay rule ...:
>
> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

See United States v. Hawkins, 905 F.2d 1489, 1494 (11th Cir.1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 707, 112 L.Ed.2d 696 (1991); *EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 926 (11th Cir.1990).

The government laid a foundation for the introduction of the Scheer memorandum under the business records exception through the testimony of Lucy Holton, a real estate paralegal in the Blank, Rome, office where Scheer worked, and Lessie Younquist, Scheer's legal secretary, who worked exclusively for him. Holton stated that Scheer would "from time to time dictate memos to the file explaining his actions in a particular closing" if "anything needed explaining in the closing;" that if "something needed explaining," it was his "habit" to "do a memo to the file"; that such memos would "be done at or about the time" of the transaction; and that it was the regular course of business of Blank, Rome and of Scheer to keep such a

memorandum in the Blank, Rome files. She testified that Scheer did not prepare such memoranda for every transaction in which he was involved, but did so "more than occasional[ly]," but not "day in and day out."

Younquist authenticated the memorandum as one that Scheer dictated and initialed and that she typed. She testified that Scheer would dictate memoranda to his files of notes and concerns regarding transactions as often as once a week or twice a month, or possibly only once a month, or perhaps occasionally, that Scheer dictated these memos in the regular course of business, and that it was his regular practice to do so. She recollected that this memorandum was dictated and typed on August 29, 1984. She testified that, normally, less than one hour would elapse between Scheer's dictation and her typing of it. She stated that other Blank, Rome attorneys also "engage[d] in that same practice from time to time."

This evidence established that: (1) Scheer dictated and Younquist typed the memorandum on August 29, 1984 (the memorandum was "made at or near the time by, or from information transmitted by, a person with knowledge"); (2) it was Scheer's regular practice to dictate memoranda to his files whenever something about a transaction needed to be explained or noted ("it was the regular practice of that business activity to make the memorandum"); and (3) it was Scheer's and Blank, Rome's practice to maintain these memoranda in the files as part of the regular course of business (it was "kept in the course of a regularly conducted business activity").

[3] In admitting the Scheer memorandum under Rule 804(b)(5), the district court found that "it does have the necessary ingredients of authenticity and the words used, guarantees of trustworthiness, circumstantial guarantees of trustworthiness are sufficient to justify its admission." This finding is not clearly erroneous, and it satisfies the requirement in the business records exception that such a

record is admissible if it meets the other requirements of Rule 803(6)—and we have held that the Scheer memorandum does so—"unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Neither the "source of information" the document contained—a telephone conversation with Scheer's client, Jacoby—nor the "circumstances of preparation"—a frequent act by Scheer in the practice of his profession—"indicate lack of trustworthiness."

Moreover, Jacoby's own testimony on cross-examination supports the district court's finding of trustworthiness. He testified that he knew of no reason why the content of Scheer's memorandum would have been less than truthful, that the memorandum "was probably a standard sort of letter to the file," that the memorandum indicated they were "missing some documentation" for the loans, and that it was "urgent" that they close the loans by August 30.

Jacoby argues that Scheer had the motive to fabricate the memo to cover himself if he were accused of improprieties in connection with the closing of the Powell loans. On the other hand, an associate in a large firm whose client instructed him to close loans with serious flaws the following day—and, as we have shown, closing the Powell loans on August 30th was critical to the Sunrise management scheme to conceal the company's seriously-flawed financial position—would be most likely to write a memorandum to the files, of the type that Scheer did, explaining that he had closed the loans only in response to his client's direction. Other Blank Rome attorneys also wrote such memoranda to record special circumstances. In the language of Rule 803(6), neither "the source of information" contained in the Scheer memorandum "[n]or the method or circumstances of preparation indicate lack of trustworthiness."

4. The problem the district court discerned in considering the admissibility of the Scheer memorandum under the business records exception was that the

memorandum was "not a routine type of thing." Jacoby challenged its admissibility as a business record essentially for the same reason, arguing that it did not record a routine transaction and indeed was "prepared because of a non-routine event."

[4] The routiness or repetitiveness with which a record is prepared is not the touchstone of admissibility under the business records exception. "... Rule 803(6) should be interpreted so that the absence of routineness without more is not sufficiently significant to require exclusion of the record. Nonroutine records made in the course of a regularly conducted 'business' should be admissible if they meet the other requirements of Rule 803(6) unless 'the sources of information or other circumstances indicate lack of trustworthiness.' " 4 J. Weinstein and M. Berger, *Weinstein's Evidence* §803(6)[03], at 803-182 (1991) [hereinafter *Weinstein's Evidence*]. It is significant, and essential to admissibility under this exception, that the record be the product of a "regular practice" of the business, *see United States v. Freidin*, 849 F.2d 716, 719-22 (2d Cir.1988), in the "usual course" of that business. See *Hawkins*, 905 F.2d at 1494 ("Admission of hearsay under this exception requires evidence 'sufficient to support the trustworthiness of the document, and to prove that it was prepared in the usual course of business.'") (quoting *United States v. Parker*, 749 F.2d 628, 633 (11th Cir.1984)). These elements are present in the Scheer memorandum.

[5] The evidence was that whenever Scheer believed it necessary to explain something or make a record of an unusual circumstance, he prepared a memorandum to the file. A significant part of his "regularly conducted business activity" was the closing of real estate loans and transfers and he frequently dictated memoranda to the files as part of that activity.

We are guided by the Advisory Committee Notes to Rule 803(6), which state:

> The element of unusual reliability of business records is ... supplied by ... actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.... The model statutes and rules have sought to capture these factors and to extend their impact by employing the phrase "regular course of business," in conjunction with a definition of "business" far broader than its ordinary accepted meaning. The result is a tendency unduly to emphasize a requirement of routineness and repetitiveness and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records. The rule therefore adopts the phrase "the course of a regularly conducted activity" as capturing the essential basis of the hearsay exception.... (Citation omitted).

The record leaves no doubt that Scheer prepared his memorandum in "the course of a regularly conducted business activity" in which it was "the regular practice" to make such memoranda. The Scheer memorandum was properly admissible under the business records exception to the hearsay rule in Rule 803(6).

[6] 5. Our ruling that the Scheer memorandum was admissible under the business records exception makes it unnecessary to consider Jacoby's argument, made in support of his contention that the memorandum was improperly admitted under the residual exception because it was unreliable, that admission of the memorandum violated his Sixth Amendment right to confront the witnesses against him.

In *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Supreme Court ruled that although the confrontation clause ordinarily requires the prosecution to establish the unavailability of the declarant and indicia of

the reliability of a hearsay statement as prerequisites to its admission, no independent inquiry into reliability is required if the evidence "falls within a firmly rooted hearsay exception." *Id.* at 65-66, 100 S.Ct. at 2538-2539.

Subsequently, in *United States v. Inadi*, 475 U.S. 387, 399-400, 106 S.Ct. 1121, 1128-1129, 89 L.Ed.2d 390 (1986) and *Bourjaily v. United States*, 483 U.S. 171, 182, 107 S.Ct. 2775, 2782, 97 L.Ed.2d 144 (1987), the Court ruled that the admission of statements of a co-conspirator made during the course and in furtherance of the conspiracy did not violate the confrontation clause because, as the court stated in Bourjaily, "the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under ... *Roberts*, a court need not independently inquire into the reliability of such statements." 483 U.S. at 183, 107 S.Ct. at 2782. More recently, the Court held that two other hearsay exceptions, for spontaneous declarations and statements made for purposes of medical diagnosis, are "firmly enough rooted" to satisfy the reliability requirements of the Confrontation Clause. *White v. Illinois*, ____ U.S. ____, 112 S.Ct. 736, 742 n. 8, 116 L.Ed.2d 848 (1992).

This court recently held that the prosecution is not required to demonstrate the unavailability of the declarant or independent indicia of reliability when evidence falls within the business records exception. "By analogy [to *Bourjaily*], we find the business records exception to the hearsay rule to be 'firmly enough rooted in our jurisprudence" to satisfy the requirements of the Confrontation Clause...." *United States v. Norton*, 867 F.2d 1354, 1363 (11th Cir.), *cert. denied*, 491 U.S. 907, 109 S.Ct. 3192, 105 L.Ed.2d 701 and 493 U.S. 871, 110 S.Ct. 200, 107 L.Ed.2d 154 (1989).

Because the memorandum was admissible under the business records exception, its use against Jacoby did not violate the confrontation clause.

B. *Merrill's Grand Jury Testimony.* 1. Merrill, Sunrise's former special loans manager, testified on direct examination that sometime in the Summer of 1984, following a meeting in Frame's office with Jacoby, Frame, and Tabor, Frame directed him to accept Frederick's worthless checks as interest payments on Frederick's loans. Merrill testified that after he stated that he could not post the checks because they were not "any good," "Jacoby told me to post them."

On cross-examination, Jacoby confronted Merrill with his grand jury testimony regarding that meeting. In that testimony, Merrill stated that after Frederick brought in the requested check, "I was instructed to put it in the computer." Merrill was then asked with whom he had that discussion. His response was: "... Bill Frame and I believe Joe Tabor was present. I wouldn't swear to that but I believe Joe Tabor was present."

Jacoby had attempted to introduce the grand jury transcript as evidence pursuant to Federal Rule of Evidence 801(d)(1)(A) as a prior inconsistent statement "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding." Jacoby sought to use that grand jury testimony as substantive evidence that he was not present at that meeting, and therefore did not order the posting of the worthless checks. The district court refused to admit the transcript into evidence, but permitted defense counsel to read the transcript verbatim to the jury on cross-examination of Merrill and to quote it in his summation.

[7] 2. Jacoby contends that the district court erred in refusing to admit the grand jury transcript as an exhibit and in refusing to instruct the jury that prior inconsistent statements made under oath are admissible as substantive evidence, i.e., that such statements can be considered as though they were made at trial.

Federal Rule of Evidence 801(d)(1)(A) provides that

> [a] statement is not hearsay if ... [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding,....

Prior inconsistent statements meeting the requirements of this rule are admissible as substantive evidence. *See Weinstein's Evidence* ¶801(d)(1)(A), at 801-136-37. The rule covers statements made to a grand jury. *Id.*

[8] We do not view Merrill's grand jury testimony as "inconsistent" with his trial testimony. Merrill's grand jury testimony, as quoted by defense counsel at trial, does not show that Merrill was asked whether Jacoby was present at the 1984 meeting at which Merrill was instructed to deposit worthless checks. He was asked with whom he had the conversation in which he was so instructed, and he answered that Frame and perhaps Tabor were present. He never stated that Jacoby was not present at the meeting. At trial, Merrill testified, consistent with the grand jury testimony, that Frame ordered him to deposit the checks. He then testified, for the first time, that after he refused Frame's instruction, Jacoby told him to do so.

Merrill testified in much greater detail about this meeting at trial than he did before the grand jury. Indeed, based upon the portions of the grand jury testimony quoted in the record, the focus of that testimony may not have been on who was present at the meeting, but on whether Merrill was ordered to post worthless checks. "To testify later in greater detail in response to detailed questions is not inconsistent, especially when the added detail was not crucial to the earlier conversation." *United States v. Leach*, 613 F.2d 1295, 1305 (5th Cir.1980).

[9] In any event, even if the district court should have admitted Merrill's grand jury testimony into evidence, its failure to do so was harmless and not prejudicial to Jacoby. The court permitted Jacoby to impeach Merrill by reading verbatim the transcript of Merrill's grand jury testimony. Jacoby thus was able to develop fully before the jury the alleged inconsistencies between the witness' trial and grand jury testimony. The defense also quoted Merrill's grand jury testimony in summation. In fact, the defense made substantive use of the grand jury testimony in its summation, inviting the jury to conclude that Merrill's statements before the grand jury were the truth, and that his trial testimony was a mistake. In the circumstances, the district court acted within its discretion in excluding from evidence the transcript of Merrill's grand jury testimony, *see United States v. Russell*, 703 F.2d 1243, 1249 (11th Cir.1983), Jacoby was not prejudiced by the exclusion, and the district court was not required to instruct the jury that it could consider Merrill's grand jury testimony as evidence.

III

Cross Examination Regarding the Forbes Magazine Article

[10] In 1984, *Forbes* Magazine published an article based on an interview with Jacoby. The article attributed to Jacoby the statement, in the context of Sunrise's expansion into states where there were retirees, that "anywhere there's a flock of retirees[,] [i]t'll be like shooting ducks." Other statements by Jacoby in the article included: "I have a pretty wife, a Jaguar, a Mercedes, a beautiful home, a yacht. I want a Ferrari, a bigger house, a bigger boat. I want an airplane, an apartment in New York"; and that if all went according to his plan, by 1988 "I'll have a whole pile of money."

Prior to Jacoby's testimony, the government indicated it wanted to introduce the article as part of its case-in-chief.

The district court refused to admit the article, but stated that it "could conceivably be relevant on rebuttal." When Jacoby testified in his defense, he stated, on direct examination, that the *Forbes* article painted a picture of him "that I didn't think was appropriate," and that some of his comments in the *Forbes* article were "facetious" and "off the record." Jacoby went on to explain, in some detail, many of his statements in the article.

Over Jacoby's objection, the court permitted the prosecutor to cross-examine Jacoby about various statements attributed to him in the *Forbes* article, including those quoted above. Jacoby contends that the district court improperly permitted the prosecutor to cross-examine him about the article and that the prosecutor misused Jacoby's statements in the article during closing argument to "inflame" the jury against him.

Although the district court initially ruled that the government could not introduce the *Forbes* article as part of its case, when Jacoby testified in his direct examination about the article, he "opened the door" to cross-examination about it by the government. *See United States v. Vigliatura*, 878 F.2d 1346, 1351 (11th Cir.1989). The cross-examination was designed to refute or discredit Jacoby's direct testimony giving his explanation of the statements in the article and, also, to discredit his general credibility.

The district court has broad discretion to determine the permissible scope of cross-examination and we review its rulings on that issue under an abuse of discretion standard. *In re McDonald*, 819 F.2d 1020, 1023 n. 4 (11th Cir.1987). Furthermore, the decision whether Federal Rule of Evidence 403 excludes evidence because its prejudicial effect outweighs its probative value also is vested in the sound discretion of the trial court. *Wilson v. Attaway*, 757 F.2d 1227, 1242 (11th Cir.1985). We cannot say that the district court abused its discretion in allowing this cross examination.

Nor did the prosecutor misuse Jacoby's *Forbes* comments in his closing argument. The prosecutor justifiably referred to the comments as inconsistent with Jacoby's trial testimony. Jacoby neither objected nor requested a curative instruction.

IV

Alleged Prosecutorial Misconduct

[11] Both Jacoby and Skubal contend that the prosecutor engaged in misconduct that denied each of them a fair trial. Jacoby argues that the prosecutor improperly characterized Jacoby's testimony and improperly attacked the ethics and integrity of Jacoby's trial counsel. Skubal contends that certain comments of the prosecutor in his opening and closing arguments were improper.

A. The prosecutor stated in his closing argument:

> The inconsistencies ... between Mr. Jacoby's testimony and that of a number of Government witnesses is [sic] so glaring and so clear that it isn't just a mistake. Someone is committing perjury.... It is going to be for you to decide, who is that person or persons.

He also stated, in response to the testimony of two witnesses that Skubal and Frame, and not Jacoby, approved all the overdrafts: "Now, based upon the evidence you have heard, that's an absolute lie."

"The statements of a prosecutor will justify reversal of a conviction if they undermined "the fairness of the trial and contributed to a miscarriage of justice." *United States v. Obregon*, 893 F.2d 1307, 1310 (11th Cir.), *cert. denied*, [494] U.S. [1090, 110 S.Ct. 1833, 108 L.Ed.2d 961] (1990) (quoting *United States v. Sawyer*, 799 F.2d 1494, 1507 (11th Cir.1986) (per curiam)), *cert. denied* [sub nom. *Leavitt v. United States*], 479 U.S. 1069 [107 S.Ct. 961, 93 L.Ed.2d 1009] (1987)." *United States v. Smith*, 918 F.2d 1551, 1562 (11th

Cir.1990). Furthermore, a prosecutor's statements during closing argument require reversal only if "the comments are both improper and prejudicial to a substantial right of the defendant," *United States v. Rodriquez-Suarez*, 856 F.2d 135, 139 (11th Cir.1988), *cert. denied*, 488 U.S. 1045, 109 S.Ct. 875, 102 L.Ed.2d 948 (1989); *Obregon*, 893 F.2d at 1310, and we review such alleged misconduct in light of the "particular facts of the case and in the context of the entire record." *Smith*, 918 F.2d at 1562. We have also held that because the statements of counsel are not evidence, the district court may rectify improper prosecutorial statements by instructing the jury that only the evidence in the case is to be considered. Id. (citing *United States v. Barshov*, 733 F.2d 842, 847 (11th Cir.1984), *cert. denied*, 469 U.S. 1158, 105 S.Ct. 904, 83 L.Ed.2d 919 (1985)).

We conclude that the prosecutor's remarks, although colorful and perhaps flamboyant, were neither improper nor unduly prejudicial, and do not require reversal. In each instance the prosecutor asked the jury to consider, and draw its conclusions from, the evidence in the case. See *United States v. Moore*, 710 F.2d 157, 159 (4th Cir.), *cert. denied*, 464 U.S. 862, 104 S.Ct. 192, 78 L.Ed.2d 169 (1983). Moreover, the district court properly instructed the jury: "[Y]ou must consider only the evidence that I have admitted in this case;" "[r]emember, folks, that any statements, objections or arguments made by the lawyers are not evidence in the case." *See Barshov*, 733 F.2d at 847. Because the prosecutor's remarks did not undermine the fairness of the trial or result in a miscarriage of justice, we discern no reversible error.

[12] B. Jacoby contends that, during his closing argument, the prosecutor attacked the ethics and integrity of his trial counsel through various statements allegedly impugning counsel's trial strategy. Viewed in context, however, the prosecutor's remarks did not attack the ethics and integrity of Jacoby's counsel. The prosecutor mainly was

simply commenting on the inability of Jacoby's defense, after all the evidence was presented, to support the position articulated in Jacoby's opening statement. These were permissible comments on the evidence in the case.

C. Skubal's claims of prosecutorial misconduct, which Jacoby adopted, fare no better. Some of the prosecutor's statements that Skubal challenges were, as the district court ruled, fair and appropriate. The court struck from the record comments that it considered improper and directed the jury to disregard them. As noted, the court also told the jury that statements of counsel were not evidence and that it was to consider only the evidence. No prosecutorial comment, taken in the context of the whole record, undermined the fairness of the trial or resulted in a miscarriage of justice for Skubal. *Smith*, 918 F.2d at 1562.

D. The trial of this case took seven weeks, and the prosecution delivered a lengthy opening summation which occupies 113 pages of the transcript and a shorter closing summary. Although both Jacoby and Skubal now attack a number of statements in the prosecutor's summation, at trial Jacoby did not object to any of the statements in the opening summation and only two of those in the closing summation. Skubal objected once during the opening summation and once during the closing summation. In ruling on the four objections, the district court carefully considered them and explained the reasons for its decision. Jacoby and Skubal's failure to object to most of the prosecutor's arguments that they here challenge seriously weakens their present claim that those remarks were improper and prejudicial and denied them a fair trial. *See Russell*, 703 F.2d at 1243 ("Having failed to object to the prosecution's [closing] argument at trial, defendant can succeed only if the remarks were so prejudicial that they constituted plain or fundamental error."). The prosecutor's summation was vigorous, forceful and colorful, but it did not

undermine "the fairness of the trial" or produce "a miscarriage of justice." *Obregon*, 893 F.2d at 1310.

V

Denial of Skubal's Motion for Severance

Prior to trial, Skubal moved for a severance. The district court denied the motion, and also denied Skubal's two renewals of the motion during the trial. Skubal argues that during trial, "it became apparent that the case had little to do with" him, that much evidence was introduced at trial that had nothing to do with, but was highly prejudicial to him, and that his joint trial with Jacoby severely prejudiced him.

[13][14] "The general rule in this circuit is that defendants who are jointly indicted should be tried together, and this rule has been held to be particularly applicable to conspiracy cases. *United States v. Alvarez*, 755 F.2d 830, 857 (11th Cir.1985), *cert. denied sub nom. Hernandez v. United States*, 474 U.S. 905 [106 S.Ct. 2721, 88 L.Ed.2d 235] (1985) and *Portal v. United States*, 482 U.S. 908 [107 S.Ct. 2489, 96 L.Ed.2d 380] (1987)." *U.S. v. Castillo-Valencia*, 917 F.2d 494, 498 (11th Cir.1990), *cert. denied sub nom. Pulido-Gomez v. United States*, ____ U.S. ____, 111 S.Ct. 1321, 113 L.Ed.2d 253 (1991). We review a district court's denial of a motion for severance under the abuse of discretion standard, *Castillo-Valencia*, 917 F.2d at 498, and are reluctant to second guess a district court's decision to deny such a motion. *U.S. v. Gonzalez*, 804 F.2d 691, 694 (11th Cir.1986). To establish that the district court abused its discretion in denying severance, a defendant must show that without severance "he suffered compelling prejudice against which the trial court could offer no protection." *United States v. Magdaniel-Mora*, 746 F.2d 715, 718 (11th Cir.1984); *see also United States v. Morales*, 868 F.2d 1562, 1571 (11th Cir.1989). "The test for assessing compelling prejudice is whether it is within the capacity of jurors to follow a court's

limiting instructions and appraise the independent evidence against each defendant solely on that defendant's own acts, statements, and conduct, and, if possible, severance should not be granted." *United States v. Silien*, 825 F.2d 320, 323 (11th Cir.1987). If the possible prejudice may be cured by a cautionary instruction, severance is not required. *United States v. Barnette*, 800 F.2d 1558, 1570 (11th Cir.1986), *cert. denied*, 480 U.S. 935, 107 S.Ct. 1578, 94 L.Ed.2d 769 (1987).

[15] Skubal and Jacoby were indicted jointly. The indictment charged a single conspiracy and various substantive offenses that were interrelated aspects of the scheme to conceal Sunrise's financial problems. The evidence showed that Skubal had a significant role in the conspiracy and was involved in several of the substantive transactions, for which he was convicted. The evidence against Skubal was introduced throughout the trial. *Cf. United States v. Castro*, 829 F.2d 1038, 1046 (11th Cir.1987) (joinder improper where one month elapsed between commencement of trial and appearance of first relevant witness against Castro). At Skubal's request, the district court gave limiting instructions that the jury was not to consider certain evidence against Skubal "in any way or for any purpose."

The jury had no problem in following the court's instructions and in separately evaluating the evidence against each defendant. Although it convicted Jacoby of fifteen of the eighteen counts in which he was charged, it convicted Skubal of only five of sixteen counts. See *United States v. Caporale*, 806 F.2d 1487, 1501 (11th Cir.1986), *cert. denied*, 483 U.S. 1021, 107 S.Ct. 3265, 97 L.Ed.2d 763 (1987) and *cert. denied sub nom. Gopman v. United States*, 482 U.S. 917, 107 S.Ct. 3191, 96 L.Ed.2d 679 (1987). The district court's denial of severance did not result in any "compelling prejudice" to Skubal, and the court did not abuse its discretion in so ruling.

VI

Sufficiency of the Evidence to Sustain Skubal's Conviction

Skubal further contends that the evidence was insufficient to prove that he knowingly and intentionally misapplied bank funds or conspired to do so. His principle contention is that he was simply a mid-level manager at Sunrise with no policy-making authority, a technician with regulatory experience who followed his superiors' instructions, but did not have any criminal intent.

Viewing the evidence in the light most favorable to the government, *United States v. Blanco*, 920 F.2d 844, 845 (11th Cir.1991), it is sufficient to sustain Skubal's convictions.

[16] Three misapplication counts on which Skubal was convicted involved the three $500,000 Powell loans. Skubal attended the meeting at which Jacoby decided to make those loans, which enabled Frederick to pay off his overdrafts. After Jacoby directed Skubal to work out the details of the loans and to "get it done," Skubal prepared the sets of loan documents for Powell, Valosin, and Wood, including commitment letters which he signed, knowing them to be false. These loans circumvented the supervisory agreement and concealed the facts about Frederick's overdrafts from the Sunrise board of directors. The evidence supports the jury's conclusion that Skubal knowingly participated in a deceptive or fraudulent transaction when he executed these "sham" loans. *United States v. Stefan*, 784 F.2d 1093, 1096-97 (11th Cir.), *cert. denied* 479 U.S. 1009, 107 S.Ct. 650, 93 L.Ed.2d 706 and *cert. denied sub nom. Freedman v. United States*, 479 U.S. 855, 107 S.Ct. 193, 93 L.Ed.2d 125 (1986).

[17] The evidence also supports Skubal's conviction on the one misapplication count involving Skubal's approval of more than $4 million in overdrafts on Frederick and Moye's Sunrise accounts. Frederick testified that Skubal or Frame

approved all of the overdrafts on his accounts, and another witness testified that these approvals occurred on almost a daily basis. A Sunrise branch manager received her instructions regarding Frederick's accounts primarily from Skubal. The evidence further showed that the approval of overdrafts was another means for making funds available to Frederick and Moye in excess of the loans-to-one-borrower limitation, that Sunrise's management endeavored to conceal the overdrafts from regulators and from Sunrise's board, and that Skubal participated in that effort. The Sunrise board was never informed of the overdrafts, which only it could approve, Skubal, experienced in banking regulatory matters (he was a former federal bank examiner), never disclosed the $4,000,000 in overdrafts (which should have been reported as unsecured loans) to state and federal regulators, even though such information was specifically requested.

[18] The evidence was sufficient to support the jury's conclusion that Skubal joined in the conspiracy to misapply bank funds. He actively participated in approving the overdrafts and in the loan manipulations designed to remove the overdrafts from Sunrise's books. Together with Frame, he approved the overdrafts. He was present at the meeting at which the loans were planned, and he subsequently prepared the false documents to support those loans. This evidence allowed the jury to find that Skubal knowingly was part of an agreement to participate in an illegal venture, and is sufficient to sustain the conspiracy conviction. *United States v. Garate-Vergara*, 942 F.2d 1543, 1547 (11th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 1212, 117 L.Ed.2d 451 (1991).

Contrary to Skubal's contention, the jury's acquittal of him on a number of substantive counts cannot be viewed as an affirmative jury determination that he did not commit those offenses. All the jury necessarily determined was that the government had not proved beyond a reasonable doubt

that he had committed the crimes. Despite the acquittals, the jury would consider the facts in evidence relating to those counts in determining whether Skubal was a member of the conspiracy. Moreover, once the existence of a conspiracy has been established, a lesser amount of evidence will suffice to show that a particular individual joined the conspiracy. *United States v. Orr*, 825 F.2d 1537, 1543 (11th Cir.1987).

VII

The Jury Instruction on the Misapplication Statute

[19] Skubal's proposed instruction on the misapplication statute, 18 U.S.C. s 657, was that the statute required proof that the defendant knowingly and willfully acted with intent to "injure or defraud" the savings and loan association. All parties agreed to this instruction and the court gave it in the written charge. Before the jury retired to deliberate, Skubal objected to other instructions, but not to this one.

After the jury had retired, it sent a note to the judge pointing out that although his written instructions had said injure "or" defraud, the indictment charged that the defendants had acted with intent to injure "and" defraud and that the oral instruction also used "and," and requested clarification. Skubal urged the court to tell the jury that injure "and" defraud was the correct requirement and asserted that the "core" of his defense was predicated on the government's obligation to prove that he had intended both to injure and to defraud Sunrise. The court refused the jury's request for clarification, ruling that the written instruction was correct. Skubal contends that the district court erred in refusing to accept his position, and that the effect of the court's adoption of the injure "or" defraud charge was impermissibly to broaden, and therefore to amend, the indictment.

The law in this circuit, upon which the district court relied in its instruction, is that, under §657, "the accused

must have acted with an intent to injure or defraud the bank." *United States v. Payne*, 750 F.2d 844, 855 (11th Cir.1985). The instruction was a correct statement of the law, was requested by all parties, and was not objected to until after the jury had retired for its deliberations and discovered the discrepancy between the indictment and the written instruction. The district court did not err in refusing to give the jury the conjunctive instruction.

[20] Having himself requested the instruction, Skubal is in no position now to complain that the court gave it—particularly since he did not object after it was given. *Cf.* Fed.R.Crim.P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict...."). If the requirement that the government must prove intent to injure and defraud was indeed the "core" of Skubal's defense, it is curious that he proposed an instruction incorporating the injure or defraud standard and did not raise the point until the jury was deliberating and asked for clarification. Moreover, in view of Skubal's initial support of and acquiescence in the "or" instruction when it was given, his present claim that the instruction constituted an impermissible broadening of the indictment rings hollow.

[21] Skubal also contends that the district court should have defined "intent to injure" for the jury, as he requested. The court was not required to do so. *See United States v. Anderton*, 629 F.2d 1044, 1048-49 (5th Cir.1980) ("terms which are reasonably within the common understanding of juries, and which are not technical or ambiguous, need not be defined in the trial court's charge").

CONCLUSION

The convictions of Robert C. Jacoby and Thomas Skubal are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT C. JACOBY, THOMAS SKUBAL,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

May 27, 1992.

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: COX, Circuit Judge, DYER* and FRIEDMAN**, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

[EMMETT R. COX]
UNITED STATES CIRCUIT JUDGE